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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

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In the United States District Court
for the Northern District of California

ROGER SCHLAFLY, Plaintiff
v.
PUBLIC KEY PARTNERS, and
RSA DATA SECURITY INC., Defendants.

and

RSA DATA SECURITY INC., Plaintiff
v.
Cylink, Caro-Kann, and Stanford

) Case C-94-20512 SW PVT
)
) Summary Judgment Validity
) Motion Opposition
)
)
)
) Case C-96-20094 SW PVT
)
) Sept. 4, 1996

Schlafly opposes Cylink's three recent motions for summary judgment on the validity of the Stanford patents. They raise no new issues, and only interfere with our schedule.

Case history

Last year, Schlafly filed a motion to invalidate the Diffie-Hellman, Hellman-Merkle, MIT, and Schnorr patents. Cylink filed a motion to have the Stanford patents declared valid. There was a hearing on Dec. 6, 1995. The Court has not explicitly ruled on either motion.

1
2 In its later denial of a Cylink motion for preliminary injunction,
3 the Court implied that it needs to see more evidence to decide
4 validity of the Stanford patents. Cylink then lobbied for a quick
5 hearing on claim construction, followed by a trial. But now Cylink
6 argues that there are virtually no claim construction issues under
7 dispute, and no material facts under dispute, so the patents
8 should be found valid by summary judgment.

9
10 Cylink's motions

11
12 On the eve of the Stanford patent hearings, Cylink now makes three
13 motions, two to rehash validity arguments already made, and one to
14 foreclose Schlafly from making additional arguments.

15
16 Cylink's memos are such nonsense, that it is hard to see what it
17 is trying to accomplish. Is it trying to squirm out of the trial
18 it just asked for? Does it think that just because there are two
19 plaintiffs, it gets two shots at every argument? Is this a plan
20 to overload the RSADSI lawyers who have vacations planned this
21 month? Is it hoping that the Court forgot the flaws in Cylink's
22 arguments?

23
24 Cylink says it does not seek to reopen old pending issues, but
25 then proceeds to do exactly that. It says that patents are
26 presumed valid by law, but then fails to explain why it needs this
27 Court to say that the Stanford patents are presumed valid. It says
28 that it need not introduce evidence, and then files hundreds of

1 pages of documents. It says that there are no material facts in
2 dispute, but does not (yet) supply a joint statement of undisputed
3 facts. It asked for a Markman hearing and a validity trial, but
4 then pretends that these are unnecessary.

5
6 Bad timing

7
8 Cylink's timing is unusual, if not downright disruptive. We have
9 a Markman hearing starting on Sept. 4, to be followed by a speedy
10 trial on the validity issues. The whole purpose of the Markman
11 hearing is to narrow the legal issues involved. Cylink ought to
12 be willing to wait for that resolution, and then argue for summary
13 judgment based on the Court's claim construction.

14
15 Issues already briefed

16
17 Cylink's motion rehashes arguments already briefed. It duplicates
18 arguments made against my motion for partial summary judgment, and
19 in its own motions for patent validity and preliminary injunction.
20 RSADSI and I have already answered them.

21
22 In particular, Cylink's argument that "enablement is tested as of
23 the patent filing date" is rebutted by my briefs filed for the
24 Dec. 6, 1995 and Feb. 29, 1996 hearings. Cylink ignores In re
25 Wright, 999 F.2d 1557, 27 USPQ2d 1510 (Fed Cir 1993), which is
26 more recent and on point than its citations. Even Cylink's own
27 citations do not support its positions, and I hope the Court reads
28 them. For example, Cylink relies heavily on In re Hogan 559 F.2d

1 595 (CCPA 1997), quoting it as "enablement was established for all
2 time ...". The full sentence includes the phrase "considering all
3 available evidence (whenever that evidence became available)".
4 There was no debate over whether the Hogan patent enabled one to
5 make the claimed invention, but rather whether the breadth of the
6 claims was commensurate with the specification, an entirely
7 different issue. (See also US Steel v. Philips, 865 F.2d 1247
8 (Fed Cir 1989) where the same issue was raised in litigation of
9 the Hogan patent. The analogous issue in our case would be for
10 RSADSI to argue that Hellman-Merkle's broad claims should not
11 cover the RSA invention because the specification does not
12 anticipate RSA. Then Cylink could reasonably cite Hogan in
13 rebuttal.) A full reading actually weighs in favor of admitting
14 evidence about the breaking of the trapdoor knapsack. Evidence of
15 non-enablement is relevant "whenever that evidence became
16 available".

17
18 Likewise, Cylink's "printed publication" arguments have also been
19 rebutted. Cylink cites a list of cases that upheld patents under
20 35 USC 102(b) challenges, but not one of them involved an enabling
21 disclosure to the public before the critical date. For example,
22 the oral disclosure in Howmedica was not enabling, and the
23 documents in Northern Telecom were marked "not for public
24 release".

1 Cylink violates the spirit of case consolidation order

2
3 The Court consolidated the Schlafly and RSADSI challenges to the
4 Stanford patents for the obvious judicial efficiency of having a
5 unified trial on the validity. But Cylink attempts to divide the
6 plaintiffs by directing one motion at Schlafly, and two motions at
7 RSADSI. The apparent purpose of this maneuver is to repeat
8 arguments against RSADSI which did not fly when they were made
9 against Schlafly. Cylink should wait for the consolidated trial
10 to argue validity.

11
12 I can understand Cylink's impatience with the progress of this
13 case. I would like to see it moving faster myself. But I did not
14 think it was proper to just keep filing the same summary judgment
15 motions over and over.

16
17 Our agreed-upon plan of action is to decide claim construction,
18 and then validity. The Markman decision permits doing it the
19 other way around, at the discretion of the judge, but that is not
20 what Cylink proposed, and that is not what we all agreed to.

21
22 Declaration of validity is meaningless

23
24 Patents are presumed valid, as a matter law. We do not need an
25 order from the Court to affirm 35 USC 282. Plaintiffs have a
26 challenge to the patents waiting to be tried. It is totally
27 meaningless for the Court to declare them valid while we are
28 waiting for trial.

1 Argument foreclosure attempt

2
3 Cylink's motion against Schlafly attempts to foreclose Schlafly
4 from making any additional invalidity arguments. No justification
5 is given.

6
7 Schlafly acknowledges that he has already put his best arguments
8 forward. It would be very strange to shut the door on invalidity
9 arguments on the eve of a Markman hearing. I have based my
10 arguments on what I believe to be the proper claim construction of
11 the patents, but if the Court adopts a different claim
12 construction, then it may bring other invalidity arguments into
13 play. Cylink has not even presented its claim construction yet.
14 It is entirely possible, and maybe even likely, that I will attack
15 Cylink's claim construction as indefinite, overbroad, or both. If
16 Cylink prevails with its claim construction, then I will want to
17 modify my invalidity arguments accordingly.

18
19 Cylink's maneuver implies that I am under some sort of requirement
20 to put forward all of my invalidity arguments right now. I
21 believe this is incorrect as a matter of law. I have a motion for
22 summary judgment pending. In that motion, I obviously made my
23 best arguments, but there is no necessity to make all of my
24 arguments. If and when that motion gets shot down, I am entitled
25 to introduce new evidence or make new arguments. Cylink cannot
26 presume otherwise, and certainly cannot get a "summary judgment",
27 the only effect of which would be to limit my evidence and
28 arguments in the upcoming trial to that which I presented in my

1 Dec. 6, 1995 motion.

2
3 I do not wish to give the impression that I am trying to hold back
4 evidence or arguments. Actually, I revealed all of my evidence
5 and arguments in my complaint over two years ago. Some additional
6 evidence has trickled in, and I have always made it promptly
7 available. If Cylink wants to ask for an early discovery cutoff
8 and trial date, then I am all in favor of it as long as it is
9 binding on all the parties. But Cylink is trying to use a summary
10 judgment motion as a mechanism for freezing my legal position
11 without freezing the other parties, and that is not what summary
12 judgment motions are for.

13
14 Facts in dispute

15
16 I am happy to hear that Cylink says that no facts are in dispute
17 -- but if this were true, why are we having a trial? I will
18 confer with Cylink to prepare a joint statement of undisputed
19 facts. I will propose the following facts, each of which has
20 solid and un rebutted evidence on the record. If these do not show
21 up in a joint statement (with perhaps some descriptive
22 qualifiers), then you will know that they are disputed.

23
24 * The August preprint was enabling.

25
26 * Each of the three oral disclosures was enabling.

27
28 * The August preprint was distributed in August 1976.

1 * None of the early disclosures had an explicit confidentiality
2 condition, except the IEEE journal submission.

3
4 * The trapdoor knapsack has been broken.

5
6 * The patent disclosures do not enable signatures.

7
8 If Cylink disputes these facts, then I suspect we will have to
9 make a determination at trial.

10
11 Conclusion

12
13 Cylink's motions contribute nothing to an orderly resolution of
14 the issues. Schlafly requests that the Court deny the motions,
15 and proceed with a Markman hearing on Sept. 4 and a validity trial
16 this fall. At best, Cylink's papers just give a statement of
17 where it stands on the Stanford patents, and remind us that it is
18 anxious about its patents expiring.

19
20
21
22 Dated: Aug 5, 1996

23
24 By: 

25
26 Plaintiff, Roger Schlafly, Pro Se

CERTIFICATE OF SERVICE

Schlafly v. Public Key Partners and RSA Data Security Inc.
Case No. C-94-20512-SW, (PVT).
Filed on July 27, 1994, San Jose, Calif.

The undersigned hereby certifies that he caused a copy of:

Summary Judgment Validity Motion Opposition
to be served this date by First Class Mail upon the
persons at the place and address stated below which is
the last known address:

Thomas R. Hogan
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and to be emailed to the following:

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I declare under penalty of perjury under the laws of the State
of California that the foregoing is true and correct.

Executed in Soquel, Calif. at the date below.

Dated: Aug 5, 1996

By: 

Plaintiff, Roger Schlafly, Pro Se